for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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MUZZLING YOUR OWN WITNESSES: If a Witness Wants to Take Responsibility for Your Client's Alleged Crime, Do You Have an Obligation to Shut Him Up?

By Jeremy Mussman, Trial Group Counsel - Group D and Jerald Schreck, Deputy Public Defender - Group D

We've all seen the old Perry Mason shows where Perry browbeats a witness on the stand and the witness breaks down and confesses. Let's change the scenario a bit. What if Perry actually conducted a pretrial interview with this witness and, during the interview, the witness told Perry "I need to tell you, I am the one who killed Mrs. Jones. Your client had nothing to do with it." At that point, does Perry have an obligation to run to the judge and say "Your Honor, I just spoke with a witness who is implicating herself in a first degree murder. You must assign her an attorney immediately!" At which point the judge would assign another attorney to represent this witness, this witness would promptly take the Fifth and, if the prosecutor got his way, never be heard from again. Is that what Perry would do? Is that what we should do? Many attorneys and judges seem to think so. Nevertheless, we have no such obligation. Rather, if you are trying to zealously represent your client, you have the opposite obligation -- you should pump the witness for every bit of confession you can get, have a third party present during the interview so that you can use that as a basis for a declaration against interest, and perhaps, have the witness write out a statement or sign an affidavit setting forth the specifics of why the witness, instead of your client, should be held responsible for the crime.

"This is outrageous!" some of you might say "We are officers of the court. If we see somebody hoisting himself on his own petard, we must intervene and let him know that he has the right to obtain counsel and that

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anything he says may be used against him." Flapdoodle. There is absolutely nothing in any of the ethical rules of conduct that requires us to, in effect, Mirandize witnesses and see to it that they get appointed counsel. Rather, Ethical Rule 4.3 merely requires that:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

"You can, however, ask them to tell you the truth. If, by telling the truth, they say they are responsible for the crime, you can continue to ask them for details and verification."

In other words, you cannot mislead witnesses. You must identify yourself as representing your client in a criminal proceeding. You must let them know that you are not representing them. In addition, you should not give them any advice concerning any actions that they should take regarding the proceeding. You can, however, ask them to tell you the truth. If, by telling the truth, they say they are responsible for the crime, you can continue to ask them for details and verification.

The fact that the witness may be represented by an attorney in another proceeding does not change things. ER 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer *in the matter*, unless the lawyer has the consent of the other lawyer or is authorized to do so.

(Emphasis added)

A 1995 case from the Second Circuit Court of Appeals contains an excellent discussion of a criminal defense attorney's obligations under these circumstances. *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) concerns a situation where a criminal defense attorney contacted a potential witness in a drug conspiracy case, despite knowing that this potential witness was represented by counsel and that it was likely that other charges were about to be filed against the witness and the attorney's client as a co-defendant in a related matter. The Court concluded that the attorney did not act unethically when he contacted this witness, explaining:

> We are not prepared to hold that a defense attorney engaging in critical pre-trial investigation, which might produce valuable sources of impeachment material or, better, direct evidence of his or her client's innocence is committing professional misconduct. That attorney is providing the effective defense and the zealous representation required by the Sixth Amendment and DR 7-101, respectively. 48 F.3d at 651.

So, if you have one of those situations where your client tells you that another fellow in the jail has come to him and confessed to the crime with which your client is being charged, and this other fine fellow is not a co-defendant in your case, you can interview this other person without ever contacting his attorney. Of course, you shouldn't do this if you have a conflict (e.g. the witness is represented by our office). Absent a conflict, however, you are free to speak with the witness as long as you don't mislead him or ask him anything about his other pending case.

As a practical matter, it's quite likely that the witness will, at some point, be appointed counsel by the court. This will probably occur after the prosecutor interviews the witness and finds out that the witness is

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implicating himself in the crime and gutting the prosecutor's case against your client. At that point the prosecutor will do everything that he or she can to shut up your star witness. This includes having an attorney appointed for the star witness and encouraging the star witness to take the Fifth. An excellent article concerning the appropriateness of a witness taking the Fifth was written by Larry Matthew back in July 1992. Rather than repeat Larry's points here, we encourage you to obtain a copy of this article from Lisa Kula at the Maricopa County Public Defender's Office -- ask for Lawrence S. Matthew's article entitled "Invoking the Fifth: Confronting the Reluctant Defense Witness" located in Volume 2, Issue 7 from the July 1992, *for The Defense* newsletter. The bottom line, however, is that it's quite likely that the witness will eventually take the Fifth and you may be precluded from calling him as a witness at your trial if all he is going to do is get on the stand and take the Fifth (note, however, that you should not roll over and die on this -- as Larry discusses in his article, you may be able to call the witness if you can show a "valid purpose"). Even then, however, all is not lost -- if you have laid the groundwork by having a third party present during the interview, you can still get your star witness' statements in front of the jury because they are declarations against interest. Your investigator can take the stand and he can tell the jury, blow-by-blow, how he/she observed the witness confess.

"If you have laid the groundwork by having a third party present during the interview, you can still get your star witness' statements in front of the jury because they are declarations against interest."

Our foremost obligation is to our clients. Effective representation requires seeking out viable defenses. If a witness, on his own, stands up and takes responsibility for the crime with which your client is charged, count your blessings and get as much information from him as you can. Use this witness to your client's advantage. Your client, not the witness, deserves your zealous representation. ■

PAINLESS RESTITUTION

By Robert Ventrella
Supervisor, Durango Juvenile Office

None of us really LIKE restitution hearings. We are criminal lawyers, not civil lawyers. We are not Goldberg & Osborne. Some of us become weak in the knees when faced with issues of damage caused by our client(s). Stipulations often seem the way to go because after all, as the prosecutors always contend, our client will not pay the restitution anyway. However, failing to face the issue now may cause the client grief later. Maybe he will suffer a probation violation or face a contempt citation (see A.R.S. 13-810 if you doubt this). Maybe he will end up with a civil judgment that allows him to buy his future vehicles only from E-Z Credit Auto Sales (with accompanying 50% interest). Therefore, the restitution phase may be as important as the trial/sentencing phase.

Believe it or not, as a juvenile lawyer (not a lawyer who acts like a juvenile...usually), we out here in Siberia deal with these issues often. Often it involves thousands of dollars which could dog the juvenile (or parent) for years. Our duties as lawyers may extend to treating this almost as a mini-trial, complete with discovery, motions, etc. The good news is that even if you lose everything, this usually means that the client is in no worse position than if the hearing never took place. Of course, if negotiations involve a proposed stipulation for less than originally requested by the victim and you lose, you may have to eat those words (I have had this happen to me).

Basic Law

Restitution in juvenile court is governed by A.R.S. 8-341 and requires the juvenile "To make full or partial restitution to the victim of the offense for which the juvenile was adjudicated delinquent." A.R.S. 8-341(G)(1). The adult version is A.R.S. 13-603 which states: "If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court..." A.R.S. 13-603 (C). "Economic loss" is defined in A.R.S. 13-105 (14) and includes "any loss incurred by a person as a result of the commission of an offense." A.R.S. 13-804 further describes the procedures in adult court for ordering restitution.

A comparison of the two statutes shows distinct differences. In adult court, the "economic circumstances" of the defendant are not to be considered on whether restitution is to be ordered (A.R.S. 13-804 (C)) but the court must consider them in determining "the manner in which restitution is to be made." A.R.S. 13-804 (E). Juveniles, on the other hand, have several different options. The court must consider the nature of the offense, the juvenile's age, physical and mental condition, and earning capacity. A.R.S. 8-341 (G). The court can order "full or partial" restitution. A.R.S. 8-341 (G) (1). The

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court may order restitution to be satisfied by monetary reimbursement or a program of work. A.R.S. 8-341 (K)(1)(2). The final out is for the court to order the parents (they love this) to pay restitution up to a statutory limit (currently $10,000). A.R.S. 8-341 (H). This latter approach is beginning to happen on younger children's cases with more frequency. Unfortunately for Johnny Juvenile, he will have to go home and face his now debt-ridden parent.

The purpose of restitution is for rehabilitation in both systems. *State v. Contreras*, 180 Ariz. 450, 885 P.2d 138 (App. 1994); *In Re JV-503009,* 171 Ariz. 272, 830 P.2d 484 (1992). Try to convince the client of THAT! The State (contrary to the reality of the situation) does not represent the person complaining of loss, "but may present evidence or information relevant to the issue of restitution." A.R.S. 13-804 (G). There is nothing in the juvenile statutes defining the role of the prosecutor, but presumably this would apply here also. Of course, we know the situational ethics that seem to go on. The State seems to adjust its position depending upon the case/prosecutor/victim/policy/full moon.

Burden of Proof

This brings up the issue as to burden of proof. The State will often argue that a) the burden is on the defense challenging the amount; b) the burden shifts once they present just about any evidence; or c) the defendant has no "right" to a restitution hearing. There does not appear to be any controlling case law in this area. In *Matter of Juvenile Action No.JV-128676,* 177 Ariz. 352, 868 P.2d 365 (App. 1994), the court does refer to the failure of the State to establish an appropriate causal relationship (in that case, the juvenile was merely a passenger in a stolen vehicle). Thus, the State arguably has the burden of proving that the defendant caused the damage. That is a separate issue from who has to prove how much damage was caused. *JV-128676* can be used to argue that clearly the burden of proof lies with someone other than the defendant. After all, the State and/or the victim is the proponent of the alleged loss. But don't fail to read *Matter of Juvenile Action No. JV-95-0103,* 186 Ariz. 607, 925 P.2d 748 (App. 1996), where the claim of a juvenile that he did not cause the damage, but only drove the car (for two days) fell on resistant appellate ears. The court found an "inference that juvenile's criminal conduct was related to victim's damages." *JV-95-0103*, 186 Ariz. at 609.

"Thus, the State arguably has the burden of proving that the defendant caused the damage. That is a separate issue from who has to prove how much damage was caused. *JV-128676* can be used to argue that clearly the burden of proof lies with someone other than the defendant."

Restitution does not require proof beyond a reasonable doubt. *State v. Fancher,* 169 Ariz. 266, 818 P.2d 251 (App. 1991). So long as the procedure leading to a restitution award is such that the defendant is given the opportunity to contest the information on which the restitution award is based, present relevant evidence, and be heard, due process is satisfied. *Fancher,* 169 Ariz. at 268. Restitution is to be set according to the facts. If the court does not have enough evidence before it "to support a finding of the amount of restitution or the manner in which the restitution should be paid, it may conduct a hearing upon the issue according to procedures established by rule of court." A.R.S. 13-804 (G). If anyone finds those rules of court, contact me immediately. It is clear as mud as to what triggers the right to a hearing. The court of appeals once told me (memo only fortunately) that since the juvenile drove the golf cart and pled guilty and hey, this is only $100 bucks, we don't care (about my interpretation) and thus you don't need a hearing. Go figure.

Requirement to Pay

It is an abuse of discretion for a judge to require restitution by a defendant for a crime in which there is no admission or adjudication of guilt or liability, unless the defendant in a plea or otherwise, consents to such restitution. *State v. Reese,* 124 Ariz. 212, 603 P.2d 104 (App. 1979). Thus, the starting point for liability is often the plea agreement. Although a plea bargain is a matter of criminal jurisprudence, such an agreement is contractual in nature and must be measured by contract law standards. *State v. Taylor,* 158 Ariz. 561,563, 764 P.2d 46 (App. 1988). The statutory limit (value of damage or theft), in the absence of other agreement, does not limit the possible recovery for loss above the limit. *State v. Fancher,* 169 Ariz. 266, 818 P.2d 251 (App. 1991). The facts of *Fancher* are a little odd in that in exchange for waiving a jury, the charge was reduced pre-trial from a felony to a misdemeanor. It is important for the client to understand exactly what he might have to pay for. The common plaint is that "I didn't cause the damage! Why should I have to pay." Beware *JV-132905* (discussed above) which stated that since the loss to the victim could have been "inferred" from the conduct of the juvenile and no credible evidence was provided to refute the loss, it was proper to award restitution.

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Causation

There must be a causal connection between the criminal conduct and the claimed loss for a loss to be an economic loss, rather than mere consequential damages. *State v. Barrett*, 177 Ariz. 46, 864 P.2d 1078 (App. 1993). The statute and cases employ a but/for test (remember first year torts?). *Id.;* A.R.S. 13-105 (14). "Economic loss" is the functional equivalent of "actual damages." *State v. Morris*, 173 Ariz. 14, 839 P.2d 434 (App. 1992). Restitution should be ordered for actual damages that are the natural consequences of the defendant's conduct or when the court determines that the losses were foreseeable, considering the nature and character of the defendant's criminal actions. *Morris,* 173 Ariz. At 18. Victim fault is not at issue in the restitution phase of a criminal case. *State v. (Not Bill) Clinton,* 181 Ariz. 299, 890 P. 2d 74 (App. 1995). Thus, the focus remains squarely on the client.

"The state seems to clearly have the burden of establishing relationship between the acts and the damage (their protestations to the contrary)."

Damage Award

Okay. Now we've established that your client caused the damage. The next issue is what must be paid. This involves theories of recovery (Remedies!) and measures of damages. Although an award of restitution need not be confined to easily measurable damages, it must be grounded on some reasonable basis. *Matter of Juvenile Action No. J-96304,* 147 Ariz. 153, 708 P.2d 1344 (App. 1985). *State v. Brockell,* 187 Ariz. 226, 928 P.2d 650 (App. 1996) is a good case to read for measure of damages involving real or personal property. With regard to personal property (most of our cases), the measure of damages is market value less salvage value (if damaged beyond repair) or reasonable cost of repair if the property is susceptible of repair. *Brockell,* 187 Ariz. At 228. If the permanently damaged goods have no market value, their actual value to the owner is the test. *Id.* The controlling guide for the court in setting the amount of loss "is determined by applying a rule of reasonableness to the particular fact situation presented." *Id.;* see also *State v. Ellis,* 172 Ariz. 549, 838 P.2d 1310 (App. 1992) (replacement cost may be considered in certain circumstances). In determining actual value, the judge has wide latitude. *Devine v. Buckler,* 124 Ariz. 286, 287, 603 P.2d 557 (App. 1979). Depending upon the particular conditions and circumstances, the judge may consider the cost of the property when new, the length of time it was used, its condition at the time of loss or injury, the expense to the owner of replacing it with another item of like kind and in a similar condition, and any other factors that will assist in assessing the value to the owner at the time of the loss or injury. *Id.*

With regard to personal injury or death, the restitution award will be upheld if it bears a reasonable relationship to the victim's loss and the state need only present enough evidence to show that relationship. *State v. Wilson,* 185 Ariz. 254, 914 P.2d 1346 (App. 1995). In *Wilson*, the defense disputed payment for treatment by a chiropractor six months after the injury. The chiropractor (named Rau) stated that the treatment was related to the injury and the defense "did not introduce any evidence that directly controverted Rau's testimony." *Wilson,* 185 Ariz. at 260. An award of restitution may include unpaid or future medical expenses, *State v. Steffy,* 173 Ariz. 90, 839 P.2d 1135 (App. 1992); mental health counseling, *State v. Wideman,* 165 Ariz. 364, 798 P.2d 1373 (App. 1990); funeral expenses and lost earnings, *State v. Blanton,* 173 Ariz. 517, 844 P.2d 1167 (App. 1992); lost profits, *State v. Barrett,* 177 Ariz. 46, 864 P.2d 1078 (App. 1993)(which denied them but upheld the awarding of them in the right circumstances), *State v. Young,* 173 Ariz. 287, 842 P.2d 1300 (1992); and most recently (and most scarey) lost earnings as a result of attending court hearings. *State v. Lindsley,* 252 Ariz. Adv. Rep. 46, 953 P.2d 1248 (App. 1997). Now our clients have to learn to pick the economic status of their victims (just kidding).

Conclusion

The above is NOT intended to put you to sleep (your opinions possibly to the contrary) but to advise you of the major issues you must face in restitution cases. The beginning point is the plea agreement and the charges the defendant faces. After this, the next issue is whether or not your client caused the particular damage or injury complained about. The third phase has to do with the amount of damages. The state seems to clearly have the burden of establishing relationship between the acts and the damage (their protestations to the contrary). As for the amount of damage, the court must have some evidence of damage and it too is guided by the ever present, vague and discretionary reason. So, remember... you have nothing to fear but fear (and a sizeable judgment against your client and/or the juvenile and/or his/her parents) itself. A final word of comfort. If you do lose at the restitution hearing, you can turn to the prosecutor and say, "Hey, you're right... he probably won't ever pay the restitution anyway." ■

Judicial Estoppel—The Accused's Friend

By Leonard T. Whitfield
Deputy Public Defender - Group C

The concept of judicial estoppel has existed in civil practice for many years. However, the criminal courts in Arizona did not embrace the concept until the case of *State v. Towery*, 168 Ariz. 168, 920 P.2d 290 (1996). Judicial estoppel can be the accused's friend under the right circumstances.

Judicial estoppel prevents a party from taking an inconsistent position in successive or separate actions. Three requirements must exist before the court can apply the doctrine of judicial estoppel: (1) The parties must be the same; (2) The question involved must be the same; and (3) The party asserting the inconsistent position must have been successful in the prior judicial proceeding. Judicial estoppel is designed to protect the integrity of the judicial process rather than the integrity of the parties involved.

"Now that the doctrine of judicial estoppel is recognized in criminal court, it would behoove all criminal defense lawyers to compare claims made by the state at all levels, especially if co-defendants or misdemeanor charges are involved."

What set of circumstances might trigger a claim of judicial estoppel by a defendant? This author has successfully advanced the argument in two cases. One case involved a domestic violence assault between a husband and wife. The husband and wife got into a fight which resulted in the husband suffering from three broken ribs, and the wife suffering from having a portion of her ear bitten off. Both participants were patients at the hospital when they were interviewed by the police. Eventually, the wife was charged with misdemeanor assault and the husband was charged with aggravated assault. The husband decided that he wanted to go to trial, claiming "mutual combat." As time went by, it was discovered that the prosecutor in the wife's case filed a motion to dismiss due to "mutual combat" and "insufficient evidence" (her case had been transferred from justice court to city court). The city prosecutor's motion was granted (this fact was never provided by the county prosecutor, but was independently verified through proper investigation). Due to the city court's dismissal of the wife's case, the county prosecutor could not maintain a position inconsistent to "mutual combat" and "insufficient evidence," thus resulting in a dismissal with prejudice of the husband's case.

The second case is currently being appealed by the state, but it involved a police scam where the police made two police reports to describe the same incident. The first DR described a false information charge involving a situation where the defendant gave a false name after being arrested for shoplifting, but described where the defendant signed fingerprint cards using the false name. The first DR was given to the city court prosecutor. In city court, the defendant was convinced by the prosecutor to waive counsel and plead guilty to the shoplifting charge with the following stipulation: "That the following charges are dismissed, or if not yet filed, shall not be brought against the defendant: § 13-2907.01(A), DR #971430308 False Information" (The DR mentioned is the first one prepared, but listed DR #971430839 as a "connecting" DR). Immediately after sentencing in city court, the police arrested the defendant for forgery (i.e., signing the fingerprint cards with the false name), and the police provided DR #971430839 (the second DR prepared) to the county attorney without providing the first DR (the city prosecutor knew about the second DR when the plea agreement was prepared). At the preliminary hearing in justice court, only the second DR was provided in the discovery, and the defendant chose to straight waive and go to trial. The defendant admitted to pleading guilty in city court and stated that he thought that his plea had resolved all possible charges (he stated the same thing during the evidentiary hearing in Superior Court on the defense motion to dismiss). The forgery charge was dismissed with prejudice in Superior Court, after the court rejected the state's arguments claiming "good police work" and "this was not a case of double jeopardy" (we never claimed double jeopardy, only judicial estoppel and vindictive prosecution, the latter claim of which was denied by the court).

Now that the doctrine of judicial estoppel is recognized in criminal court, it would behoove all criminal defense lawyers to compare claims made by the state at all levels, especially if co-defendants or misdemeanor charges are involved. Transcripts of key proceedings may reveal a legitimate claim of judicial estoppel. ■

FAQ's FROM MENTAL HEALTH

By Barbara Topf
Deputy Public Defender - Mental Health

Hello from the Mental Health Division. Our division may not be very familiar to many members of our office because our work is highly confidential, requiring us to keep a low profile. For our first article appearing in *for The Defense* I would like to answer five of the most frequently asked questions about our division.

1. Where is the Mental Health Division located?

We have offices on the first floor of the Mental Health Annex of the Maricopa Medical Center. That is the white two story building behind the Maricopa Medical Center at the corner of 24th Street and Roosevelt. The address is 2601 E. Roosevelt.

"Our clients are not defendants, they are *proposed patients*. They are not charged with a crime, but are alleged to be *in need of mental health treatment*."

2. Who is assigned to the Mental Health Division?

We currently have three full time attorneys, Mary Miller, Curtis Beckman, and Barbara Topf. Connie Leon and Dick Rice are attorneys that work part time and Elia Hubrich is the Administrative Assistant.

3. What kind of cases does the Mental Health Division handle?

We handle several types of hearings. The majority of our evidentiary hearings are to determine if COT (Court Ordered Treatment) is necessary for our clients. Hearings are also held to determine if our clients need to be detained for COE (Court Ordered Evaluation--inpatient involuntary evaluations). We also do Judicial Reviews-- an evidentiary hearing that allows a client who has been in court ordered treatment for 60 days or more, to request release from treatment before the expiration of the court order. Annual reviews of gravely disabled persons are also assigned to our office. In these cases, the court reviews the status of gravely disabled persons and determines if continued court ordered treatment is necessary. Appeals, order to show cause hearings, transfer hearings to Arizona State Hospital, and special actions are some of the other matters in which we represent clients.

4. Who are the hearing officers and who appears for the prosecution?

The Mental Health Court is a division of the probate court where Judge Daughton is the presiding judge. Probate court commissioners hear mental health matters and currently Commissioners Donahue, Bayham-Lesselyong, Colosi, and Barrett have been assigned on a rotating basis to our single courtroom located in the hospital. In Maricopa County cases, the County Counsel division of the Maricopa County Attorney's Office represents the petitioner (the medical director of the hospital). In Arizona State Hospital cases the petitioner (the medical director of Arizona State Hospital) is represented by an Assistant Attorney General. In transfer hearings Com Care is represented by counsel from its legal department.

5. The terminology is different for mental health cases-why?

Rules of civil procedure apply to mental health cases, and specific legal terms are used. Definitions and details on mental health matters are contained in A.R.S.Title 36. Cases are assigned a MH number and captioned *In the Matter of Somebody, Re: Mental Health Services*, rather than state versus somebody. Our clients are not defendants, they are *proposed patients*. They are not charged with a crime, but are alleged to be *in need of mental health treatment*. Our clients are not sentenced or committed, they are *court ordered into treatment*. There are no complaints, counts, or charges for our clients, only *allegations in petitions for court ordered treatment or petitions for court ordered evaluations* under the criteria of danger to self, danger to others, persistently or acutely disabled, or gravely disabled.

This brief introduction is intended as an invitation to you to get to know us better. Feel free to call, e-mail, or stop by, if you want to know more about the inner workings of the Mental Health Division. We are always available to answer questions, and help our colleagues in other divisions, serve the clients of our office. ■

FROM FUTILITY TO UTILITY: Make Sure to File The *Datcher* Motion– or "Hey, It Could Happen!"

By Clifford Levenson
Deputy Public Defender - Group C

One of the pretrial motions the defense can file in a case where the mandatory sentence on conviction seems grossly out of proportion to the offense, is based on *U.S. v. Datcher*, 830 F. Supp. 411 (M.D. Tenn. 1993), in which the court allowed counsel for the defendant to describe punishment to the jury. The *Datcher* court cited to the jury's function of giving the people, as the ultimate repository of justice and common sense, a means to counter governmental arbitrariness and tyranny.

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The *Datcher* motion may seem to be an exercise in futility. But in a recent case, it proved otherwise. The defendant, a 61 year old man with no criminal record and a distinguished military career, was charged with two counts of aggravated assault. He went to his ex-wife's house (his own ex-house), under a court order to pick up property left in the driveway by the ex-wife. When he started to take some property from the back of her pickup, he was confronted by the ex-wife and two male friends. He then picked up an aluminum bracket to defend himself, or to attack, depending on who is describing the events. He then struggled over, or clocked his ex-wife with, a TV tray, and left.

The judge in the case, in chambers before closing argument, strongly urged the prosecutor to dismiss the allegation of dangerousness. When the prosecutor dropped the allegation as to the TV tray, but not as to the pointy stick, the judge granted the *Datcher* motion that had been filed, to the extent that defense counsel was allowed to tell the jury that checking the dangerousness box on the verdict form had the sole function of making a prison sentence mandatory. In eloquently explaining this ruling, the judge used terms like "abuse of prosecutorial discretion," and said that the jury was entitled to know why they were asked to make the redundant dangerousness finding if they voted to convict.

"In eloquently explaining this ruling, the judge used terms like "abuse of prosecutorial discretion," and said that the jury was entitled to know why they were asked to make the redundant dangerousness finding if they voted to convict."

Most prosecutors I have talked to found the judge's action in this case to be an unacceptable infringement on prosecutorial discretion. But it only happened in a case where there seemed to be an egregious example of abusing that discretion. So be sure and file the *Datcher* motion if the case is one in which the punishment could be disproportionate to the crime. "Once in a while you get shown the light in the strangest of places if you look at it right."

Incidentally, in the case discussed above, the jury acquitted on both counts. ■

ARIZONA ADVANCE REPORTS

By Terry Adams
Deputy Public Defender - Appeals

***State v. Lefevre*, 274 Ariz. Adv. Rep. 31 (CA 1, 7/21/98)**

The defendant was convicted of money laundering, a class 3 felony, in violation of A.R.S. §13-2317. The ruling here is that the statute is not unconstitutionally vague by imposing criminal liability on those who merely have "reason to know" that they are dealing with proceeds of an offense. The statute gives adequate notice of the type of conduct it prohibits.

***State v. Soto-Perez*, 274 Ariz. Adv. Rep. 40 (CA 2, 7/28/98)**

The trial court sentenced the defendant to the super maximum sentence of 3.75 for a class four non-dangerous non-repetitive felony. The aggravating factors used by the court are not listed in A.R.S. §13-702(C). The defendant argues that his sentence should not have been aggravated and the factors should not be considered under the "catchall" provision of subsection C(15) because if that provision is construed to allow the court to consider aggravating factors not specifically listed in C(1) through (C(14)), the requirement of §13-702.01(A) that the aggravating factors be "listed" in subsection C is rendered meaningless. The court disagrees holding that subsection C(15) is part of the list, and the court is limited to factors similar to those in C(1) through C(14). There was no abuse of discretion.

***State v. Cannon*, 275 Ariz. Adv. Rep. 15(CA I, 7/29/98)**

The state appealed from the trial court's entry of a directed verdict on one count of aggravated D.U.I. with a BAC of .10 or greater, after the jury's finding of guilt. Because the results of an HGN test were erroneously admitted as direct independent evidence to quantify the BAC at the time of driving, the court properly directed a verdict of acquittal after the verdict. A directed verdict can be entered after the verdict only if the court determines that the jury considered improper evidence, which occurred here.

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State v. Ebert, **275 Ariz. Adv. Rep. 17(CA 1, 7/30/98)**

The defendant was convicted of possession of methamphetamine. On appeal she asserts that, although she did not object, the presence of a non-Maricopa County resident on her jury venire, against whom she exercised a peremptory challenge, deprived her of the right to exercise her full complement of peremptory challenges, mandating reversal. The court held that the objection was waived and there was no fundamental error. A prospective juror's lack of statutory residency does not constitute bias or prejudice, and to exercise a peremptory challenge is not a detriment comparable to a challenge against one who should have been excused by the court for cause.

State v. Ruiz **275 Ariz. Adv. Rep. 19(CA 1, 8/4/98)**

The defendant was convicted of first degree murder. The appellate court found there was insufficient evidence of premeditation and reduced the offense to second degree. The evidence presented was that the defendant and the decedent were seen arguing and that the defendant stabbed him multiple times. Multiple stab wounds alone are not sufficient to establish premeditation, and here there was insufficient corroborating evidence. The court also held that in Arizona an on-the-record waiver of a defendant's right to testify is not necessary. Also the trial court's order precluding post-trial interviews of the jury was improper.

State v. Jenkins, **275 Ariz. Adv. Rep. 24(CA 1, 8/6/98)**

The defendant pled guilty to second degree murder. He was sentenced to 20 years flat, and was ordered to serve time under the Community Supervision Program consecutive to prison. In his P.C.R. he argued that it's illegal to sentence community supervision consecutive to a flat time sentence and that since he was not advised of this at the time of his plea, the plea is not voluntary. The appellate court determined that the community supervision term was proper and would begin at the expiration of his flat-time sentence. The court should have advised him of this at the time of the plea and remanded the matter for the trial court to determine if he knew of the requirement and if not whether it was a relevant factor in his decision to plea.

State v. Sanchez, **275 Ariz. Adv. Rep. 47(CA 2, 7/30/98)**

The defendant was arrested for aggravated DUI, the arresting officer advised him he could give two "valid" breath samples or give a blood sample. He opted for the breath test. The officer used an Intoximeter RBT-IV. At a hearing it was established that the device was not scientifically reliable, thus the results were unreliable. The results were ruled inadmissable. The defendant moved for dismissal which was granted. The state appealed arguing that suppression was a sufficient remedy. The appellate court affirmed holding that the state was on notice of the unreliability of the machine, yet chose to use it and informed the defendant of its validity, and therefore the defendant was denied a fair chance to obtain potentially exculpatory evidence at the only time it was available, thus he was denied due process.

State v. Wagner, **275 Ariz. Adv. Rep. 37(CA 1, 8/13/98)**

The defendant was convicted of first degree murder, the state sought the death penalty. After conducting a sentencing hearing the court imposed natural life. The appellate court holds that a natural life sentence and the statutory scheme prescribing it do not violate either due process or equal protection. Also, the introduction of autopsy photographs was not error because each had probative value either for corroboration or to aid the jury in understanding testimony in the case, and their prejudicial effect did not outweigh their probative value.

In re Timothy C., **275 Ariz. Adv. Rep. 43(CA 1,, 8/13/98)**

The defendant, a juvenile, was adjudicated delinquent on a charge of child molestation involving his sister. The state's case was based on a confession that the juvenile gave to a C.P.S. caseworker. The caseworker told the juvenile's mother that he had the authority to speak with the child without the parents being present and that he would close the file after he interviewed the child. The trial court refused to suppress the resulting confession. The appellate court found that this was a state action that the statements were misleading because he did not have the authority to interview without the parents being present and, although he did close the C.P.S. file, he turned the information over to the police. The confession was thus involuntary. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

United States v. Oplinger, **(9th Cir. Wash 1998) 1998 WL 388508**

No Fifth Amendment Privilege

Defendant was in charge of ordering and distributing supplies to seven bank branches, and the only person who could make cash purchases, which required prior approval. Price/Costco was the only vendor on a cash basis. For a two year period he ordered unneeded items

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from Costco, and returned them for a cash refund to the tune of over $22,000. When Costco called the bank to see if there was a problem with the quality of the merchandise, bank officers immediately called Oplinger into a meeting where they questioned him about the returns. He first said that he "occasionally" returned defective merchandise for a refund. Bank officials had proof disputing this, asked him where the money went, said he'd be fired unless the money was accounted for, and warned that bank regulators and the F.B.I. had to be called in. Oplinger's only response was to cover his eyes and say "I don't know." After a hung jury, defendant was convicted on all 21 counts of bank fraud. Oplinger did not testify at the second trial.

Defendant claims on appeal that the government improperly used his silence in the bank interview as substantive evidence of guilt, violating his privilege against self-incrimination and right to due process. Because the statements were not made after arrest, in custody, under indictment or in the face of police accusations of a crime there was no Fifth Amendment privilege issue. The government was making no effort to compel his answers, or even asking the questions.

At the first trial Oplinger testified that he used the cash refunds to purchase replacement items from Costco and other vendors. His testimony was the only evidence on this point. At sentencing on the conviction obtained at the second trial the district court found a [federal] statutory aggravating factor of 'obstruction of justice' due to this perjury. Oplinger's protest of this on appeal is rejected, as there was a lack of any documentation for such purchases, and cash would not have been used for any other vendor's merchandise. Convictions affirmed.

***United States v. Merino-Balderrama*, 146 F.3d 758 (9th Cir. Idaho 1998)**

Evid. Rule 403 - Prejudice Outweighs Probativeness

Convictions for possession of child pornography reversed, remanded for new trial due to abuse of discretion in allowing jury to watch films of children in sex acts where defendant offered to stipulate to the contents, and the nature of the films was not an issue.

At a traffic stop/arrest police found an open briefcase in the trunk when doing an inventory. The briefcase contained materials depicting child pornography; a magazine, and seven films. Each film was in a separate box which bore on its cover a photograph of children engaged in sexual conduct, taken from the film inside. Defendant explained to the F.B.I. that he found the briefcase containing the materials four months ago while cleaning a building on a farm; that he looked at the printed material, but was unsuccessful in trying to view the films by holding them up to light. Police found i.d. on the briefcase with someone else's name. At trial, the films, box covers, and magazine were introduced without objection. No evidence was proffered to show defendant had viewed the films or knew what was on them, other than the presence of the box covers.

Defendant objected to the jury seeing the films. He offered to stipulate that the materials themselves satisfied statutory elements of the offense: they did depict minors engaged in sexually explicit conduct and the materials had traveled in interstate commerce. He did not offer to stipulate to his knowing possession of the items, or that he knew the materials depicted such acts. Defendant's objection, under Federal Rule of Evidence 403 was that screening the films was unfairly prejudicial, where the potential for prejudice outweighed their probative value. This Court agrees, noting that the offer to stipulate to two elements of the offense rendered viewing the films unnecessary, that viewing the films added nothing to the government's evidence on the disputed knowledge elements. The Court assumed that viewing ten minutes of film was likely to be more inflammatory than still photographs. Such potential prejudice was not harmless. A curative instruction by the trial court advised jurors that "[a]t issue...is whether the defendant had knowledge of its contents. ...whether the defendant viewed the films.... By permitting the films to be shown...the court does not mean to suggest that the defendant saw the films...." This was insufficient to cure or prevent the prejudice.

***United States v. Albrektsen*, (9th Cir. Cal. 1998) 1998 WL 430128**

Unlawful Search of Hotel Room

Noticing defendant's car parked improperly in a handicapped space at a hotel, a police officer checked his computer, and hotel registration, determining the car belonged to Albrektsen, who had two misdemeanor bench warrants. [Let this be a lesson on forgetting court dates, and parking in handicapped spots.] A second unnamed person was also registered to defendant's room. The officer testified at the suppression hearing that because he knew the hotel was popular with meth dealers and customers, he wanted to search defendant's room and he went to the hotel room with that intent. Defendant answered the door and admitted his identity. Without arresting him or asking permission to enter, the officer walked in, forcing defendant to move away to avoid being knocked down. Only then did the officer ask to search the room, and defendant replied "I guess so." He was then arrested. The ensuing search yielded counterfeit currency and a computer system for producing it. The officer testified that he had no need to enter the room in order to make the arrest.

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Defendant's motion to suppress the evidence was denied. He claimed that there was no basis for the officer to enter the room in order to arrest him for the misdemeanors. The warrants would have been the only basis for entry into the hotel room, but as it was not necessary to enter in order to effect arrest, the warrants didn't authorize entry. At the trial level the government avowed that they were not relying on necessity of a security sweep of the room, and so that argument is rejected on appeal. The search in any event went beyond the area from which defendant might have obtained a weapon or destroyed evidence. Conviction reversed.

United States v. Edwards, (9th Cir. Wash 1998) 1998 WL 455601

Prosecutorial Misconduct

Police observed defendant driving a vehicle which was registered to a third party. He was arrested on the charge that he'd just assaulted his girlfriend. The victim said that he'd hit her with a gun, which defendant then carried to the car with a black nylon bag. A search of the car turned up the bag which contained cocaine. Elsewhere in the car was packaging material that had been on the cocaine, a file with documents bearing Edwards' name, two cell phones, but no gun. A search of defendant's home found some packaging material and scales. At trial the victim would not testify so her statement tying Edwards to the bag was precluded initially. Despite this, the victim's hearsay statement (not an excited utterance) linking him to the bag did come in at trial. One of the officers had already testified that nothing in the bag established whose it was. At this point during trial the defense attorney got a phone call from the prosecutor claiming that, in the presence of two officers, he'd just found a bail receipt with defendant's name under the cardboard bottom of the nylon bag, which had been in police property for 2 years.

Defense objected to the new evidence coming in because the entire theory of the defense was the lack of a direct link between Edwards and the bag, and the problem with cross examining the prosecutor who was a witness and advocate, or not being able to cross. If the prosecutor testified and argued as advocate he would improperly vouch for the authenticity of the critical piece of evidence. The trial court refused to exclude the evidence, grant a mistrial or allow a continuance to explore the circumstances of finding the receipt. The prosecutor staged a discovery of the bail receipt on the stand, with the same officer who earlier denied any identification of the bag's owner re-enacting the discovery. The jury was not told that this was faked. He "found" the bail receipt with defendant's name, and admitted that he'd never found it during an earlier search. Two different police officers explained the true circumstances of the find, and their role as witnesses to this. On redirect the prosecutor/finder asked one "That wasn't planted there, was it?" and got "Absolutely not." The prosecutor argued in closing that the receipt was a key piece of evidence, the smoking gun. Based on the defense close attacking the new find as suspicious, the prosecutor spent rebuttal denying that it was planted. This Court reverses the conviction, on the grounds argued by defense relating to improper vouching by an advocate/witness which may have unduly influenced the jury with the prestige of the prosecutor's office, and because the defense could not cross examine him.

Dyer v. Calderon (II), (9th Cir. Cal. 1998) 1998 WL 448039

Juror Bias/misconduct

Here the 9th circuit en banc reverses the decision of the three judge panel (2 affirming, one dissenting) that rejected Dyer's claim of bias and prejudice by a juror who lied in voir dire. The previous opinion was also summarized in *for The Defense.*

Summary of decision by three judge panel

Upon learning of possible bias or misconduct of a sitting juror defendant moved for mistrial, after a verdict but just before the penalty phase. Prospective jurors had been asked in writing if they, a relative or close friend had been a victim of a crime, or had ever been accused of any offense. The juror in question had omitted certain true answers in the questionnaire and oral voir dire. The motion for mistrial was denied although the juror concealed her brother's death by a shot to the head. In pursuing this issue in post conviction relief Appellant established that: there had been a homicide conviction for the shooting; the juror's mother testified in that criminal proceeding; the family recovered $15,000.00 in a related wrongful death suit; the juror's father, brother, ex-husband and uncle had been arrested for or accused of crimes including kidnaping and rape; a young cousin once tried to sexually assault the juror with a knife; her home and car had been burglarized multiple times. The juror gave various reasons for omitting these incidents on questionnaire and voir dire, citing: her belief that her brother's death was an accident; her relatives or their actions were so remote she hadn't thought of them; that she had not known, or forgotten the facts discovered by the defense; and that burglaries were a way of life in Oakland. The majority of the three judge panel upheld lower court findings that the juror was credible, had not lied, and showed no bias that would have supported a strike for cause.

The lone dissenter pointed out that: her brother's murder was remarkably similar to the executions in Dyer's case; the juror had argued with her family over the distribution of the wrongful death award, partly belying her

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claimed lack of knowledge; the "remote" crime by a "distant" relative was a murder charge against an uncle who had lived with her family; she was still in contact with her estranged husband who was charged with rape a month before this trial; a brother was charged with narcotics distribution; the juror used her job with California DOC to review Dyer's prison file after trial; she avoided 21 attempts to subpoena her for a hearing on her omissions or bias. Although the trial record did not contain some of this information the majority felt compelled to uphold the credibility finding by the trial court.

Analysis by 9th Circuit En Banc, 7-4 Majority

This decision reviews the ample evidence both available at the trial level and amassed for the post conviction proceedings showing that the juror lied on the voir dire questionnaire and in the hearing after conviction. The onus is put on the trial judge for not sufficiently inquiring into obvious matters, easily determined, to determine the juror's honesty or bias when first faced with the motion for mistrial. The trial judge had much of this information in his hand but he never consulted or looked at it. It was up to the judge because defense counsel, although he did much to develop the facts, could not be as aggressive in dealing with a juror who might still sit on the penalty phase in a capital case. There were other instances in addition to those described above, where the juror concealed true and correct answers to the voir dire. The astounding number of such instances in the face of what was said during voir dire compels the conclusion that she deliberately lied to stay on the jury. Under these facts prejudice is presumed. Noting that this issue was discovered five weeks after the guilt phase had ended, "[n]o judge would be eager to discover bias in these circumstances, and we attribute the trial judge's complacency to an ostrich-like desire to avoid learning anything that would jeopardize the verdict." The opinion calls the decision to find the juror credible "nearly inexplicable...and positively irrational[.]"

United States v. Vavages, (9th Cir. Az. 1998). 1998 WL 461893

Prosecutor Misconduct

Defendant's conviction reversed due to government interference with a defense witness. At a traffic stop, all four occupants of a vehicle fled on foot. Police found a large amount of marijuana in the car. One of the men was caught, and stated that "Gabe" (defendant's name is Gabriel) was in the car, but recanted this a few hours later. An officer later identified Vavages as the driver he'd seen. The car belonged to defendant and documents in it bore his name. He gave notice of an alibi defense and listed as witnesses co-defendants, and his companion Rose Manuel, her sister and his own minor children. The prosecutor interviewed Rose about the alibi. She confirmed that defendant was at home when the stop occurred. The prosecutor then found that Rose had a pending marijuana transportation charge in which she had entered a guilty plea. Although her alibi statement did not contradict any prior statements she'd made as part of that cooperation deal, the prosecutor did not believe her. He thought that similarities between defendant's charges and Rose's would help prove defendant's guilt, so he considered calling her in the government's case in chief. Just before trial Rose's defense attorney had 3-4 conversations in which the prosecutor warned that he didn't believe her alibi testimony, that if she testified falsely he could bring perjury charges and withdraw the plea in her case. As a result of these warnings Rose took her attorney's advice and asserted her 5th Amendment privilege at Vavages' trial. She gave as her reason her belief that even truthful alibi testimony would result in a perjury prosecution. The trial court accepted her blanket invocation of the Fifth on this basis. Vavages presented his alibi defense, calling his children as the alibi witnesses, while Rose (their mom) sat mute in the courtroom. Two co-defendants and Vavages himself all testified that he loaned them the car, and that he was not in it when it was pulled over. In closing, the prosecutor commented on the defendant's "shabb[y] ploy" in using his kids, making them testify in front of Mom where they looked to her "to make sure they're not getting in trouble." He pointed out the lack of any adult alibi witness.

Although the prosecutor's talks with defense counsel were professional, non-abusive, and he never directly spoke with Rose to intimidate her, this court calls his conduct "a thinly veiled attempt to coerce a witness off the stand. It does not require much...to conclude that unless [Rose] changed her testimony or refused to testify at all, she *would* be prosecuted for perjury[.]" There was no substantial basis for the "unusually strong admonitions against perjury." The threat to withdraw Rose's unrelated plea agreement raised the specter of an especially coercive threat to keep her off the stand in order to eliminate a witness important to the defense. This implicates violations of defendant's Sixth Amendment right to compulsory process, and Fourteenth Amendment right to due process. Rose's basis for asserting the Fifth, that she feared a perjury prosecution even if truthful, was not a valid basis for allowing her to remain silent. The trial judge should have rejected this and asked sufficient questions to uncover the prosecution tactic and take curative action, such as requiring immunity for Rose.

United States v. Kaluna, (9th Cir. Hi. 1998) 1998 WL 461856

Statute Shifts Burden Impermissibly at Sentencing

The federal "three strikes" law provides that regardless of any other statutes, a person convicted of a

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"serious violent felony" shall be sentenced to mandatory life imprisonment if previously convicted of two or more "serious violent felonies." "Serious violent felonies" are defined as twelve named crimes (e.g. murder, rape) which automatically qualify, and a second list of crimes presumed to qualify (e.g. robbery, arson). A third category are unenumerated felonies presumed to be "serious violent felonies" if they are punishable by 10 years in prison, and has as an element use, attempted use, or threatened use of physical force against another person OR that by it's nature involves substantial risk that physical force may be used against another in its commission. The law also provides that acts of robbery or unenumerated offenses will qualify as a "strike" only if the offense of conviction actually involved the use or threatened use of a dangerous weapon or resulted in death or serious bodily injury. The law puts the burden on a defendant to prove by clear and convincing evidence that the facts underlying his prior conviction do not meet the criteria for a "strike."

This court finds that the "dangerous weapon, serious bodily injury or death" criteria are essential statutory elements of this recidivist law, rather than an exception or affirmative defense to it. It further holds that the presumption that the prior qualifies and shifting the burden to the defendant to disprove it by clear and convincing evidence violates due process. The second and third categories of the three strikes law are deemed unconstitutional, as they are intertwined with each other and the improper burden shifting. They also seem to say that the government must prove a statutory sentence increasing provision by a preponderance of evidence. ■

BULLETIN BOARD

Attorney Moves/Changes

Todd Coolidge leaves Group C on September 25. Todd has been an attorney with the office since 1990, and has been a lead attorney with Group C for several years. He will enter private practice.

Pauline (Polly) Houle, supervisor of the Durango Juvenile office, left the office on September 16. Polly has served the office in various divisions for many years. She leaves in order to devote more time to her artistic pursuits, and will move to San Diego.

Bob Ventrella has been selected to succeed Polly as supervisor. He has been assigned to the Durango office for a number of years, following his time downtown as a felony trial attorney.

Rick Tosto left Group A on September 17. He is relocating to Detroit, Michigan, where he will continue to practice criminal defense.

New Support Staff

Two law-trained Initial Services Specialist have been hired as temporary/ part-time employees. **Elizabeth Flynn**, began on August 25. She graduated with her JD from the University of Louisville. She was a Rule 38(e) intern at the Pima County Public Defender's office and had prior volunteer work at this office. **Robyn Greenberg**, graduated from McGeorge School of Law, University of the Pacific, Sacramento. She clerked for the Federal Public Defender's office in Phoenix and Sacramento.

Eryn Linde, was hired as a temporary Clerk IV for SEF, effective September 28.

Maria Marrero, Client Services Coordinator, joined our Dependency Division on September 14. She holds a BA in Psychology from Kansas State University, and had been working for AHCCCS/ALTCS with prior experience with Child Protective Services and Developmental Disabilities.

Sandra Quinonez joined Group A as an Office Aid on August 17.

Tracy Randolph assumed the position of legal secretary with Group C, effective September 8. She holds her BA in Theater from ASU as well as certification from Phoenix College in Legal Secretary and Legal Assisting. She has spent the last year working as a legal assistant for the Attorney General's office.

Brandi Schlosser, began working as a Records Clerk on September 14.

Theresa Sullivan joined the office as an Information Technologist on September 8. She studied business and media studies at Fordham University, and most recently worked for a law firm in New York City, providing computer support.

Sundee Taylor, Legal Secretary, joined Group C in a temporary position on September 21.

Support Staff Moves/Changes

Gary Applegate, a Group D Investigator, resigned effective September 14. He has accepted a position with the Arizona State Department of Gaming.

Lisa Araiza, Lead Secretary in Group B, left the office on September 8. Lisa began her employment with this office in 1986 and has served us well as Group A's lead

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secretary, our Chief Trial Deputy's secretary, and recently as Group B's lead secretary. Last year she was one of our "Commitment to Excellence" winners. She has accepted a position with Lewis and Rocca.

Yolanda Carrier, Initial Services Specialist, left the office on August 28. Yolanda had been with the office since 1991, and was one of our "Commitment to Excellence" award winners last year. She left to pursue new career options.

Michelle Fleming, Legal Secretary, left Group D on September 25. Michelle had been a secretary with the office since 1994. She has accepted a position with the State of Arizona.

Martha Lugo has been chosen to fill a special work assignment as Lead Secretary for Group D. Martha has been a legal secretary with the office for 3 years. Martha has also completed Legal Assistant's training from the Academy of Business College.

Christene Paro, Office Trainee, will transfer from Dependency to the Durango office effective September 3.

Stacy Schaffer will move into the administrative receptionist position as of September 8. Stacy joined the office in 1995 as an office aide.

Patty Winter, a clerk with Group C, left the office on September 11. ■

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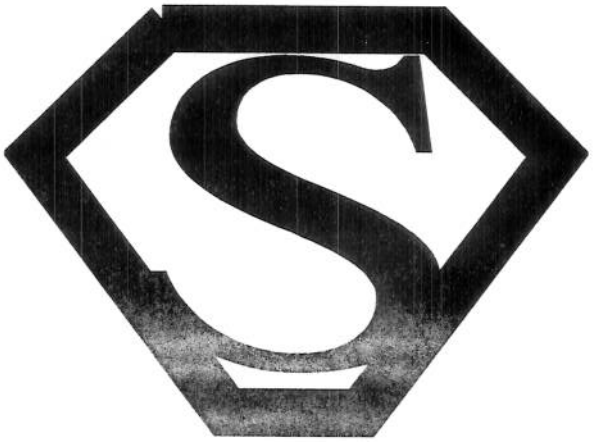

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August 1998
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/17-8/17	Farney	Baca	Robinson	CR 97-03485 Agg.Assault/F6; POND For Sale/F2; Assault/M1 with 2 priors	Guilty	Bench
7/29-7/29	Hernandez	Martin	Gadow	CR 97-07441 Agg. Assault Dang./F3 with 2 priors	Pled to 6.5 yrs. After jury selection and Dessureault hearing	Jury
7/28-8/4	Ryan/Clesceri	Baca	Freeman	CR 97-10681 2 cts. Agg. Assault Dang.	Not Guilty	Jury
8/5-8/6	Tosto	Baca	Bowen	CR 97-10171 Custodial Interference/F6	Guilty	Jury
8/10-8/12	Tosto	Dunevant	Clarke	CR 98-03350 Disorderly Conduct Dang./F6	Guilty	Jury
8/10-8/18	Kent/Howe	Sheldon	Reckart	CR 97-01784 Child Molest/F2DCAC	Not Guilty	Jury
8/11-8/25	Wuebbels	Rogers	Novak/ Kane	TR97-1462MI Assault/MI TR97-01872 DUI/MI; Leaving the Scene of an Accident/M1	Not Guilty on DUI-Jury Not Guilty on Assault DV on Leaving the Scene of an Accident	Jury
8/13-8/14	Valverde	Mangum	Kramer	CR 98-04294 Perjury/F4	Guilty	Jury
8/24-8/25	Bond	Padish	Anthony	CR 98-01881 Agg. Assault, F4	Guilty	Jury
8/24-8/27	Reinhardt	Galati	Devito	CR 98-08522 Agg. Robbery/F3 with a prior on probation	Guilty	Jury
8/26-9/2	Bond	Arrellano	Leonard	CR 98-00657 PODD/F4; PODP/F6	Not Guilty of PODD Guilty of PODP	Jury

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Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/5-8/6	Noble/ Corbett	Gottsfield	Merchant	CR 96-06398 Sale of Narcotic Drugs/F2	Guilty	Jury
8/10-8/12	Roth & Bublik/ Erb	Hutt	Luder	CR 97-08917 Poss. of Narcotic Drugs/F4	Not Guilty	Jury
8/10-8/12	LeMoine & Park/ Ames	Hotham	Pitts	CR 97-10794 1 ct. Sexual Assault/F2 1 ct. Sexual Abuse/F5	Hung Jury - Sexual Assault; Guilty - Sexual Abuse	Jury
8/17-8/20	Peterson/ Castro	Hutt	Sorentino	CR 97-04158 2 cts. Child Molest/F2 1 ct. Att. Child Molest/F3	Not Guilty on all counts.	Jury
8/20-8/24	J. Brown/ Erb	Kamin	Merchant	CR 98-05380 Agg. Assault/F5	Not Guilty	Jury
8/20-8/31	Whelihan/ Castro	O'Toole	Heilman	CR 97-11556 2 cts. Sexual Assault/F2 Vulnerable Adult Abuse/F4 Kidnap/F2	Not Guilty - 1 ct. Sexual Asssault; Directed Verdict - Kidnap; Guilty - 1 ct. Sexual Assault and Vulnerable Adult Abuse	Jury
8/21-8/27	Blieden & Agan	Dougherty	Mitchell	CR 96-11821 5 cts. Sexual Assault/F2 1 ct. Kidnapping/F2 1 ct. Child Molest/F2 DCAC 1 ct. Sexual Abuse/F3	Not Guilty - Sex Abuse Guilty on all other counts.	Jury
8/24-8/28	L. Brown/ Corbett	Hilliard	Gadow	CR 98-03548 2 cts. Armed Robbery/F2D 3 cts. Agg. Assault/F3D	Not Guilty - 1 ct. Agg. Assault - Guilty of lesser included Disorderly Conduct/F6D Guilty - 2 cts. Armed Robbery and 2 cts. Agg. Assault	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
8/3-8/5	Israel	Aceto	Craig	CR 98-90698 PODP/ F6 PODD/ F4	Guilty with priors	Jury
8/12-8/12	Gavin & Murphy/ Thomas	Scott	McCauley	CR 98-92432 Agg Assault/ F4	State dismissed without prejudice during jury selection. New plea tendered and accepted.	Jury
8/14-8/28	Klobas & Ramos/ Breen & Rivera	Dairman	Ryan	CR 96-94724 Homicide/ F1 Child Abuse/ F2	Guilty	Jury

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Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
8/18-8/24	Schmich/ Clesceri	Reinstein	Brenneman	CR 97-92157 Agg Assault/ F3	Guilty	Jury
8/18-9/1	Cotto & Nermyr/ Breen	Aceto	Jorgensen	CR 97-93788 Homicide/ F2	Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
7/31-8/3	Leyh	Gerst	Woodburn	CR 98-00247 1 ct. of Misconduct Involving Weapon/ F4	Guilty	Jury
8/26-8/27	Zelms	Katz	Keyt	CR 98-04401 1 ct. of Traffic-Stolen Property/F3 1 ct. of Theft/ F6	Not Guilty	Jury
8/24-8/27	Claussen	Gottsfield	Charnell	CR 98-06736 1 ct. of 2 ° Murder/ F1	Not Guilty of 2° murder, Guilty of Negligent Homicide/ F4	Jury
8/10-8/13	Berko	D'Angelo	Morton	CR 98-02917 1 ct. Kidnap/ F2 1 ct. Sex Abuse Over 15/ F5	Not Guilty on Kidnap Hung on Sex. Abuse over 15	Jury
8/10-8/19	Steiner	Akers	Cutler	CR 97-13708C 5 cts. of Armed Robbery/ F2	Guilty	Jury

DUI Unit

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/10-8/11	Carrion	Gerst	Boyle	CR 97-10854 1 ct. Agg DUI/ F4	Guilty	Jury
8/13-8/18	Carrion	Gerst	Lawritson	CR 98-01284 1 ct. Agg DUI/ F4	Hung Jury	Jury
8/25-8/27	Timmer	Schwartz	Boyle	CR 96-07953 1 ct. Agg Assault (w/veh)/ F3	Guilty	Jury

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Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
8/10-8/13	Edwards/ Apple	McVey	Hernandez	CR 93-00405 (B) Burglary, 1 / F2 Agg.Asslt./ F3D Kidnapping/ F2	Guilty	Jury
8/18-8/26	Orent/ Soto & Pangburn	Arellano	McCormick	CR 96-10713 Felony Murder 1/ F1D Kidnapping/ F2D Agg.Asslt./ F2D	Ct.1: No Decision/Pending Double Jeopardy Issues Ct.2: Guilty, Lesser Included Unlawful Imprisonment, C6D Ct.3: Guilty	Jury
8/6-8/12	Orent/ Pangburn	Cole	Stelly	CR 97-94713 Att.Murder 1/ F2D Agg. Asslt./ F2D	Not Guilty attempt murder Guilty agg. asslt.	Jury
8/13-8/19	Patton	Katz	Neugebauer	CR 98-02780 Trans.of Dang.Drugs for Sale/ F2 Poss.of Dang.Drugs for Sale/ F2	Guilty	Jury
8/25-8/26	Dupont/ Horral	Baca	Schesnol	CR 97-14406 Burglary, 3°/ F4	Not Guilty	Jury
8/10-8/12	Baeurle/ Williams	Barker	Grimes	CR 98-06433 Agg.Assault/ F6	Plead during trial to Misdemeanor Assault/ M1	Jury
8/18-8/21	Canby	Cole	Manning	CR 98-02105 Burglary, 3°/ F4	Guilty Crim. Trespass/ M2	Jury

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INSIDE ADDITION

The Insider's Monthly September 1998

TRAINING NEWS

The 4th Quarter County Training Catalog is now available. You can access the catalog through the EBC. Your supervisor should also have a copy. The following letter to supervisors is included in the catalog, but it can serve as a guideline for anyone who is considering taking a class.

Training is a Tool

Training is a tool that helps an organization meet its business objectives and build capacity in its employees. In this catalog, you will find a mix of classes for professional growth, personal development, skill builders to help you and your staff perform your jobs better.

Classes are high quality; no or nominal cost.

We are able to deliver these classes to you at no or nominal cost because of the growing core of Maricopa County's adjunct faculty. Every member of this "volunteer" staff are subject matter experts in the areas they teach. You can be assured the instruction is high quality while being relevant to the way Maricopa County does its business.

Consider these reasons to take or to send employees to classes.

- to improve job performance
- to support a personal or professional development plan
- to recognize a job well done
- to network with other professionals like yourself

How many classes are enough?

Every effort has been made to make these classes look appealing. Several classes may look inviting to you and your staff. That's good. To help you decide which ones and how many to take, ask yourself these questions:

- What does my work unit need right now?
- What does this employee need to do a better job right now?
- What coverage do I need to arrange while the employee is at class?
- Will the class be offered again next quarter?
- If I sent two from the same department to the same class, would they be better able to implement the ideas when they return to the job?

What is the return on investment of training?

Training is endorsed by the County Administrator and upper management because they understand that training and the time spent in training is an investment in the overall health and vitality of the Maricopa County workforce. In his book, The Seven Habits of Highly Effective People, Stephen covey talks about "sharpening the saw". He describes the need for a time out, away from the demands of the daily routine to replenish, restore and revitalize oneself. The energy and improved techniques brought back to the job result in improved performance that dramatically offsets the short time away from the job.

Get the most out of training.

To maximize the impact of training, meet with your staff before and after the class. Discuss how the key topics in the class pertain to your work unit. Help put the class into the context of the business objective of your work unit. Upon completion of the class, in a follow up conversation, get the staff member's ideas on how key concepts form the class can be applied to the job. It may be desirable to include these ideas as a part of the work unit on the key points covered in the class. Sharing the information with others often helps the trainee to retain the information. ■

PERSONNEL PROFILE

Dan Sheperd
Defender Attorney - Group C

Dan was born in Bloomington, Minnesota then moved to western New York, between Buffalo and Erie, Pennsylvania for seven years. He attended high school in Clarksdale and Vicksburg, Mississippi before moving to the Valley in 1977. He graduated from Coronado high school and proceeded to Whitman College in Walla Walla, Washington for his undergraduate degree. He returned to Arizona to attend law school at ASU. After law school, he was Judge Reinstein's first bailiff, then he joined the office in 1986. From 1986 to 1989 he was assigned to Groups C and D, then spent a year in private practice. Since returning to the office, he has been a member of Group B, and recently volunteered for duty with Group C.

What is your idea of perfect happiness? Being at home with Kim and Sam and having them say "Daddy dance with us" or on the beach on a tropical island in the South Pacific, one toe in the water, an umbrella drink in hand, with. . .

What is your greatest fear? My back giving out while dancing with my daughters.

Which living person do you most admire? Neil Armstrong and Nelson Mandela.

Which living person do you most despise? John Paxton (see game 6 of the 1993 NBA finals.)

Who are your heroes in real life? Kimberly and Samantha.

Who is your favorite hero of fiction? The "Incredible Shrinking Man" and Jean Val Jean.

What is the trait you most deplore in yourself? I think procrastination, but let me get back to you on that.

What is the trait you most deplore in others? Intellectual dishonesty.

What is your greatest extravagance? Mecca happy hour.

On what occasion do you lie? I never lie, I always tell the truth, of course, I could be lying now.

If you could change one thing about yourself, what would it be? Better vertical jump.

What do you consider your greatest achievement? I once stole the ball from John Stockton in a pick-up game. (OK, so he bounced it off his foot, I was in position behind him to pick it up.)

What is the quality you most like in a man? I refuse to answer on the grounds that it might get me into trouble.

What is the quality you most like in a woman? I refuse to answer on the grounds that is has already gotten be into trouble.

What do you most value in your friends? Their ability to hold their liquor.

If you were to die and come back as a person or thing, what do you think it would be? A slug, oops, already am. In that case, a dog.

If you could choose what to come back as, what would it be? Michael Jordan.

What is your motto? What's a motto? ■

THE LIGHTER SIDE

"I know imaginary friends are normal, but this imaginary lawyer thing worries me."